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No. 85810-1

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN

FILED
JUN 13 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CHAD MINNICK, et al.,

Plaintiffs/Appellants,

v.

CLEARWIRE US, LLC and DOES 1 through 10,

Defendant/Appellee.

BRIEF OF DEFENDANT/APPELLEE CLEARWIRE US, LLC

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I. INTRODUCTION

When plaintiffs signed up for telephone or internet service from Clearwire US, LLC, they had a choice between (1) a month-to-month contract or (2) a contract with a commitment for two years of Clearwire service, which required them to make monthly payments totaling at least $700. Nothing in Washington law required Clearwire to offer an option for an early exit from its term agreements. Indeed, Washington routinely enforces term contracts (such as leases) that require monthly payments. But Clearwire provided customers an option to cancel early, pay only for the service they received, and owe an "early termination fee" ("ETF") that would never exceed $220, declining over time. For all but a few months, this would give a customer an opportunity to save money if the customer chose—for whatever reason—to terminate the contract.

No rational customer would prefer a term contract with no exit clause to a term contract that, through application of an ETF, gave the flexibility to cancel early for any reason and save money. Plaintiffs, however, urge the Court to adopt a rule that would forbid businesses from granting that flexibility. Indeed, plaintiffs label "unconscionable" any contract that allows consumers the option to terminate for a fee. Plaintiffs' rule defies common sense where, at the time of contracting, the contractual ETF presents a rational alternative to full performance.

Here, plaintiffs all chose to sign up for two-year contracts, instead of month-to-month agreements, accepting that they would need to pay an ETF if they decided to terminate early, for whatever reason. In dismissing plaintiffs' ETF claims, the district court concluded that Clearwire's ETF functioned as an alternative performance measure rather than a liquidated damages clause. The district court observed that plaintiffs' choices, as described in their Amended Complaint, bore this out: depending on which option cost less, some ***chose*** to terminate early and incur the ETF (exercising the valuable option to free themselves from the obligation to pay their remaining monthly charges, without debating cause), while others ***chose*** to fulfill their term commitments.

The district court correctly applied Washington law—and the preferable rule. As a result, in response to the Certified Question, this Court should hold that the ETF operates as an alternative performance provision. Plaintiffs made an enforceable promise to make monthly payments for two years, but the ETF gave plaintiffs a genuine and enforceable alternative to that promise—the hallmark of an alternative performance clause.

In their effort to characterize the ETF as a liquidated damages clause, plaintiffs argue that a true alternative performance provision would require Clearwire to provide two years of service in exchange for their early termination and ETF. But the case law refutes that argument, as courts long have approved early cancellation or termination fees as means of alternative performance on term contracts.

Plaintiffs also point to the theoretical possibility that Clearwire ***might*** assess an ETF for a customer's breach or in an amount exceeding a customer's remaining monthly payment obligation. But plaintiffs do ***not*** allege Clearwire imposed an ETF against any of them for breach or in an amount that exceeded their remaining monthly payments. Instead, their allegations make clear they chose whether to incur the ETF depending on whether it was the less costly option. As a result, those hypothetical issues have no bearing on this case or on the Certified Question before the Court.

Finally, the Court should decline plaintiffs' invitation to go beyond the Certified Question to hold that Clearwire's ETF is an unenforceable penalty. Plaintiffs' allegations flatly contradict their arguments that the ETF has an "in terrorem" effect of forcing them to make monthly payments and discourages "efficient breaches." Moreover, invalidating the ETF would leave some plaintiffs and most (if not all) Clearwire customers who failed to fulfill their term contracts liable to Clearwire for breach of contract in amounts that exceed the ETFs. In other words, about half of the plaintiffs and most (if not all) of the putative class they purport to represent would be ***worse off*** if plaintiffs invalidate the ETF.

II. CERTIFIED QUESTION

"Does Washington law treat the ETF at issue in this case as an alternative performance provision, or as a liquidated damages clause," Certified Question Order at 4192, where (1) plaintiffs entered into an undisputedly enforceable agreement to make monthly payments for two years; (2) the ETF gives plaintiffs a genuine alternative to their promise to make monthly payments for two years; (3) giving customers the option of canceling their term contracts early by paying an ETF rather than making monthly payments for the full term cannot be unconscionable; and (4) Clearwire does not impose the ETF only upon breach—the defining characteristic of a liquidated damages clause?

III. STANDARD OF REVIEW

In reviewing a certified question, this Court "consider[s] the legal issues not in the abstract but based on the certified record provided by the federal court." *Carlsen v. Global Client Solutions, LLC*, __ Wn.2d __, __ P.3d __, 2011 WL 1796409, at *2 (May 12, 2011); *see also* RCW 2.60.030(2). When a federal court certifies a question, this Court does "not have jurisdiction to go beyond the specific question presented by the Certification Order." *Louisiana-Pacific Corp. v. Asarco Inc.*, 131 Wn.2d 587, 604, 934 P.2d 685 (1997) (refusing invitation to rule on issue "beyond the scope of the certified question"); *see also* RCW 2.60.020.

IV. STATEMENT OF THE CASE

A. Factual Background

1. Plaintiffs' Allegations

Clearwire provides wireless Internet and telephone (VoIP) service. ER 16, 20-21 [Am. Compl.] ¶¶ 1.2, 3.13.[1] Plaintiffs are several Clearwire customers residing in Washington, Hawaii, North Carolina, Minnesota, Wisconsin, and Virginia, who all claim (in substantially identical language) that Clearwire improperly assessed ETFs to deter them from canceling service. ER 15-17 ¶¶ 1.1-1.8. They allege Clearwire's early termination fee is unenforceable for a number of reasons, and they seek damages for breach of contract, Washington Consumer Protection Act violations (because of the ETF and allegedly false advertising concerning service quality), and unjust enrichment. ER 46-56 ¶¶ 6.1-12.6.

Plaintiffs purport to assert these claims on behalf of all Clearwire subscribers whose "contracts … include an early termination fee provision," as well as for the subset of that group who have "paid an early termination fee to or have been charged an early termination fee by" Clearwire within the four years before plaintiffs sued. ER 21 ¶ 4.1.

Plaintiffs' Amended Complaint also complains about Clearwire's service quality. ER 25-26 ¶¶ 5.2-5.4. Chad Minnick, for example, alleges

[1] "ER" refers to plaintiffs' Excerpts of Record; "SER" refers to Clearwire's Supplemental Excerpts of Record.

he relied on Clearwire's representations that wireless Internet service would be a "reliable alternative to cable Internet and DSL" and believed the service "would be of a reasonably acceptable quality." ER 34 ¶ 5.32; *see also* ER 35 ¶ 5.37 (Stephenson). According to Minnick, Clearwire's service performed well for a while but "became unreliable, slow, and often would cease to work entirely," i.e., he alleges that he suffered service degradation and interruptions. ER 34 ¶ 5.33. Other plaintiffs likewise allege that the service performed well at times but poorly at other times. ER 36 ¶ 5.43 (Reimers); ER 39 ¶ 5.56 (Jelinski). One complained that her internet service "did not work at all" after she moved outside Clearwire's service area. ER 42 ¶ 5.74 (Gresfrud).

2. Plaintiffs Agreed to Make Monthly Payments for Two Years, Unless They Chose to Cancel Early, in Which Case They Agreed to Pay an ETF

Plaintiffs subscribed to Clearwire's service, entering into Service Agreements that set forth the terms of their subscription. ER 20-21 ¶¶ 3.1-3.12. As the Ninth Circuit observed in its certification order, all twelve plaintiffs could have chosen a month-to-month contract with no ETF. Instead, they chose to enter into term contracts, through which they agreed to make monthly payments for two years, unless they chose to cancel early—in which case they agreed to pay an ETF and be released from their remaining monthly payments under their contracts. ER 16-17 ¶ 1.4;

ER 18-20 ¶¶ 3.1-3.12; SER 120 [Camacho Decl.] ¶ 14. Plaintiffs Minnick, Jelinski, Grefsrud, Keller, and Reynolds agreed to monthly recurring charges for their initial two-year subscriptions of $36.99, i.e., $887.76 over the full term. SER 120 [Camacho Decl.] ¶ 14. Plaintiffs Stephenson, Reimers, Schultz, Bartley, Cuhel, McVicker, and Girod agreed to monthly recurring charges for their initial two-year subscriptions of $29.99, i.e., $719.76 over the full term. *Id.*

Plaintiffs admit they agreed to the ETF set forth "in several places" in their Service Agreements. Br. 13; ER 16 ¶¶ 1.4-1.5.[2] In fact, the introduction to their Agreements emphasized in bold, capitalized letters that subscribers should read the Terms of Service "**CAREFULLY BECAUSE IT INCLUDES MANY IMPORTANT TERMS, INCLUDING: ... · FEES FOR EARLY TERMINATION.**" The second section of the Terms of Service, labeled "**2. Term of the Service; Termination Fees,**" gave subscribers the option to end their monthly payment obligation early by paying a declining ETF, which in no event would exceed $220—far less than the $719.76 or $887.76 total monthly payment obligation to which all twelve plaintiffs agreed. *See* ER 30-31

[2] Plaintiffs in their brief assert that Clearwire presents its Service Agreements for the first and only time on its website. Br. 13 (citing ER 29 (Compl. ¶¶ 5.15-16)). But the cited section of the Amended Complaint alleges only that "Plaintiffs and members of the class subscribed to Defendant's service and entered into a Service Agreements with the Defendant." ER 29 (¶ 5.15). In fact, the assertion in plaintiffs' brief is both unsupported by the record and false.

(¶¶ 5.18-5.20 (quoting Terms of Service)); *see also* ER 62-65 (Ex. A ¶ 2); SER 119-20, 150-51, 174-75, 184, 193, 215 [Camacho Decl. ¶ 7, Ex. C ¶ 31; *id.* ¶ 8, Ex. D ¶ 31; *id.* ¶ 9, Ex. E ¶ 2; *id.* ¶ 10, Ex. F ¶ 2; *id.* ¶ 12, Ex. H ¶ 2]. Plaintiffs Jelinski, Reynolds, and Kuhel signed up for service before March 1, 2007, SER 119 [Camacho Decl. ¶ 7], and agreed to a $180.00 ETF if they chose to cancel. The remaining plaintiffs signed up after March 1, 2007, *id.*, and their contracts contained a declining ETF of either $120.00 or $220.00, depending on the type of service to which they subscribed, decreasing every month. ER 30-31 ¶¶ 5.19-5.20.

Plaintiffs' own allegations contradict their false assertion that Clearwire "enforced [the ETF] against ***every*** Plaintiff." Br. 15. In fact, plaintiffs allege that five plaintiffs chose to terminate their contracts early, knowing Clearwire would require them to pay the ETF in return for releasing them from their remaining monthly obligations, because paying the ETF cost them ***less*** than making their remaining monthly payments. ER 38 ¶ 5.53; ER 40 ¶ 5.62; ER 42 ¶ 5.74; ER 45 ¶ 5.91; ER 46 ¶ 5.96. Five plaintiffs (including two who moved out of Clearwire's service area) chose to continue making their agreed monthly payments ***without incurring an ETF***, apparently because that cost less than paying the ETF. ER 36 ¶ 5.40; ER 37 ¶ 5.48; ER 41 ¶ 5.69; ER 43 ¶ 5.80; ER 44 ¶ 5.87. And two plaintiffs (Minnick and Jelinski) wanted the best of both worlds:

they chose to terminate their contracts early but refused to pay either an ETF or their remaining monthly payments. ER 35 ¶ 5.35; ER 39 ¶ 5.58. In other words, they behaved as if they had entered into a month-to-month obligation—an option they opted not to pursue originally.

No plaintiff alleges Clearwire imposed an ETF for breach of plaintiffs' contractual obligations to Clearwire. No plaintiff alleges Clearwire imposed an ETF in an amount that exceeded the total amount of his or her remaining monthly payments for the agreed term. *See generally* ER 15-58 [1st Am. Compl.].

B. Procedural History

On February 5, 2010, the district court granted Clearwire's motion to dismiss plaintiffs' claims. As to the ETF claims, the district court ruled: "Dismissal of Plaintiffs' ETF claims is appropriate because the ETF functions as an alternative method of performance rather than a liquidated damages provision." *Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179, 1184 (W.D. Wash. 2010). The district court reasoned:

> Plaintiffs here signed term contracts with set monthly payments and could pay the ETF to terminate service before the end of the contract's term. (*See* Camacho Decl. ¶ 14.) At the time of contracting, both options provided plausibly beneficial outcomes for the consumer. Customers could elect to fulfill their contract in one of two ways: (1) they could pay for service for the full term of the contract with Clearwire or (2) pay the monthly fee for a shorter term plus the ETF.... ***[T]he promisor had the flexibility to choose their method of performance because of the Service Agreement's alternative term.*** The Court observes that this freedom of choice is borne

> out in Plaintiffs' own allegations. Some Plaintiffs have elected to incur the ETF. (*See* ¶¶ 5.34, 5.53, 5.62, 5.74, 5.91, 5.96 (Plaintiffs incurring ETF).) Others decided to continue making monthly payments because it was cheaper. (*See* ¶¶ 5.39-5.40, 5.46-5.48, 5.77-5.80, 5.87 (Plaintiffs continuing with monthly payments).)

Id. (citing, *inter alia*, *Bellevue Sch. Dist. v. Bentley*, 38 Wn. App. 152, 684 P.2d 793 (1984)). In rejecting plaintiffs' claims that Clearwire had been unjustly enriched by the ETFs it had collected, Judge Pechman observed that invalidating the ETFs would leave plaintiffs with only one option: making monthly payments for the agreed term. In the court's words:

> Plaintiffs have not pled the unenforceability of the severability provision of the contract. (*See* First Am. Compl., Ex. A ¶ 25.) Thus, ***even if the ETF is deemed unlawful and that provision of the contract is unenforceable, Plaintiffs would still have their payment obligations under the monthly fee provisions.***

Id. at 1187 (emphasis added). The district court allowed plaintiffs 30 days to move for leave to file an amended complaint. *Id.* at 1189. Instead of seeking leave, plaintiffs filed a notice of appeal on March 8, 2010.

The parties fully briefed and argued the matter before the United States Court of Appeals for the Ninth Circuit. On March 29, 2011, the Ninth Circuit issued an order certifying to this Court the present certified question ("Certified Question Order" or "Cert. Order").

On March 31, 2011, plaintiffs filed in the district court a gratuitous motion seeking an indicative ruling whether the court would grant relief from judgment and allow them to file an amended complaint based on allegations that Clearwire supposedly fraudulently signed up customers outside its coverage areas. In response, Clearwire showed that plaintiffs' fraud allegations (based on hearsay statements of a disgruntled former Clearwire employee) had no basis in fact. *See* Clearwire's Resp. to Pls.' Mot. for Indicative Ruling, Case No. 2:09-cv-00912-MJP, Dkt. No. 34 (W.D. Wash. Apr. 18, 2011). Clearwire also showed that plaintiffs' proposed amended complaint established that plaintiffs could ***not*** have been subjected to the alleged fraudulent scheme. *Id.* at 10. On June 7, 2011, the district court denied plaintiffs' motion, ruling that it would not grant plaintiffs leave to amend even if it had jurisdiction to do so. *See* Order Denying Indicative Ruling, Case No. 2:09-cv-00912-MJP, Dkt. No. 39 (W.D. Wash. June 7, 2011).[3]

V. ARGUMENT

A. The ETF Offers a Proper Alternative Means of Performance.

1. Plaintiffs Entered into Enforceable Agreements to Make Monthly Payments for Two Years.

Plaintiffs entered into term contracts for Clearwire service, and they tacitly concede that Washington courts enforce fixed-term contracts

[3] Plaintiffs' assertion in their Opening Brief that the Ninth Circuit did not certify the present question to this Court until April 1, 2011—after plaintiffs filed their motion for indicative ruling—is demonstrably false. Br. 10. In fact, plaintiffs waited until after the Ninth Circuit issued the Certification Order before they filed their motion—in an obvious and inappropriate effort to salt the record with extraneous (and grossly inaccurate) allegations before proceedings in this Court.

of this nature. In *TMT Bear Creek Shopping Center, Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 195-98, 209-11, 165 P.3d 1271 (2007), for example, a tenant wanted to terminate a lease a year before the fixed-term lease ended. The parties entered into a lease termination agreement under which the tenant agreed to vacate by a certain date and pay a "termination fee" representing the present value of the remaining lease payments for the agreed term and the landlord agreed to "release" the tenant from the lease. *Id.* at 195. The tenant paid the fee but did not timely vacate. *Id.* at 196. The landlord sued, seeking rent during the holdover period beyond the termination fee representing the rent owed for the original lease term. *Id.* at 197-98. The trial court concluded the landlord was entitled not only to the termination fee representing rent through the end of the agreed term, but also to rent that accrued during the holdover period. *Id.* at 198-99. The Court of Appeals affirmed because, among other things, the award placed the landlord in the "same economic position it would have occupied had the contract been fully performed." *Id.* at 211 (citing *Rathke v. Roberts*, 33 Wn.2d 858, 865-66, 207 P.2d 716 (1949)).

Similarly, in *Syrovy v. Alpine Resources, Inc.*, 122 Wn.2d 544, 546, 548, 550-51, 859 P.2d 51 (1993), this Court agreed with the Court of Appeals that the trial court properly found that the buyer under a two-year timber purchase agreement owed the seller the full outstanding balance under the contract. There, the parties agreed the buyer would buy "all the merchantable timber" it could produce from the relevant area during the contract's two-year term, for a total purchase price of $140,000, paid through four installments. *Id.* at 546-47. The buyer made an initial partial payment and began harvesting, but then stopped harvesting and stopped making payments before the two-year period expired. *Id.* at 547.

After the contract's expiration, the seller sued for breach, seeking the "balance of the contract payment." *Id.* at 548. The buyer argued he had no contractual obligation to make the remaining payments, contending the contract merely created a series of options, under which he was required to pay only if he in fact harvested timber. *Id.* at 547-49. This Court rejected that argument, concluding the contract "create[d] an arrangement where payment [was] to occur in timed installments," and where "payment [was] mandatory, rather than optional," regardless of the quantity of timber harvested. *Id.* at 551. *See also Hargis v. Mel-Mad Corp.*, 46 Wn. App. 146, 151-52, 730 P.2d 76 (1986) (defaulting tenant required to pay remaining rent due under term contract); 1 CORBIN ON CONTRACTS § 1.19, at 60 (1993) (parties may enter express contracts for stated time periods, including, for example, "contracts for a continuing supply of a commodity").

Although no Washington court in a published decision has decided whether to enforce term contracts in the consumer context, other courts have. For example, in *In re Cellphone Fee Termination Cases*, 193 Cal. App. 4th 298, 330, 122 Cal. Rptr. 3d 726 (2011) (published in part), on which plaintiffs rely, the California Court of Appeal affirmed the trial court's decision in its entirety, ***including*** the court's conclusion that Sprint had the right to contract damages resulting from plaintiffs' early terminations, measured by the amount of unpaid monthly payments for the agreed terms less Sprint's avoided costs. *See id.* at 731, 735, 753. *See also Maddox v. ADT Sec. Servs.*, 2011 U.S. Dist. LEXIS 1069, *1 (N.D. Ill. Jan. 6, 2011) (enforcing three-year contract for security services, though it contained a non-negotiable early termination fee provision).

Contracts for defined-length terms ensure fixed—often favorable—pricing to consumers for the duration of the agreed term, protecting them against the risk of rising prices on a month-to-month contract. Other courts have recognized that "a fixed price contract expressly assigns the risk of market increases to the seller," such that increased production costs cannot relieve the seller of the fixed price. *Exelon Generation Co. v. Gen. Atomics Techs. Corp.*, 559 F. Supp. 2d 892, 904 (N.D. Ill. 2008) (citing *N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.3d 265, 278 (7th Cir. 1986)). Term contracts such as Clearwire's protect customers from price increases, while at the same time giving customers the ability to predict their obligations over the life of the contract.

Here, each plaintiff chose to enter binding term contracts and agreed to make monthly payments for the contract's duration. Each agreement expressly stated that "[t]his is a binding agreement between you and Clearwire LLC," that each plaintiff had "read and understood, and … agree[d] to, each of the provisions of the Agreement," and that each plaintiff agreed to "maintain Service for the duration of any minimum Initial Term." SER 134-35, 150, 159-60, 174. *See also* SER 183-84, 192-93, 203-03, 214-15. The district court properly concluded that without the ETF, "Plaintiffs would still have their payment obligations under the monthly fee provisions," 683 F. Supp. 2d at 1187, a conclusion plaintiffs have never disputed.

2. The ETF Gives Plaintiffs a True Alternative to Their Promise to Make Monthly Payments for Two Years.

Under Washington law, "[a]n alternative contract is said to be … one in which a party promises to render some one of two or more alternative performances either one of which is mutually agreed upon as the bargained-for equivalent given in exchange for the return performance by the other party." *Chandler v. Doran*, 44 Wn.2d 396, 401, 267 P.2d 907 (1954) (quoting 5 CORBIN ON CONTRACTS § 1079, at 379). "[I]f on a true interpretation it appears that it was intended to give a real option (that is, that it was conceived possible that at the time fixed for performance, either alternative might prove the more desirable), the contract will be enforced according to its terms." *Id.* "A ***chief factor*** in resolving the question [whether a provision is an alternative performance provision] is whether the promisor has a ***free choice*** between performances." *Bellevue Sch. Dist. v. Bentley*, 38 Wn. App. 152, 154, 684 P.2d 793 (1984) (emphasis added). Other factors "include whether the promisor had a 'true option' on which alternative to perform, whether the money payment is equivalent to performance of the option, and the relative values of the performances." *Id.* at 155-56. Because the relative value of the alternative performances may change over time, "[t]he time at which the value of the alternatives is to be judged is at the time of contracting." *Id.* at 156 (citing 5 CORBIN ON CONTRACTS § 1213).

The Ninth Circuit correctly distilled from this framework the two hallmarks of an alternative performance contract under Washington law:

> Our understanding of Washington law is that the ETF would be a valid alternative performance contract if (1) subscribers had a "real option" between remaining subscribed for the full term or paying the ETF, and (2) there exists a reasonable relationship between the two choices.

Cert. Order at 4190-91. Under this framework, Clearwire's ETF gives plaintiffs a true—and generally cheaper—alternative to their promise to make monthly payments for two years.

In *Chandler*, this Court upheld, as an alternative performance contract, an agreement giving an employer the right to avoid its obligation to allow an employee to purchase property by paying the employee an additional amount in salary and moving expenses. The Court explained:

> If . . . the contract provides that the promisor shall have a choice or option between performances, or that on payment of a named sum his contract shall be null and void, ***or that for a specified payment he may regain the legal privilege of not rendering the promised performance***, the contract may well be regarded as an alternative contract.

44 Wn.2d at 402 (citing 5 CORBIN ON CONTRACTS § 1213, at 883-84) (emphasis added). The Court held the employer to its agreement to pay additional salary and moving expenses upon its election not to sell the property to the employee. In so doing, the Court reasoned that the employer "apparently reserved the right to decide whether it would be to its best interests to honor its obligation to pay plaintiff additional salary, rather than to honor its agreement to sell the plant." *Id.* at 403. Because the option to pay additional salary was a true alternative that the employer might choose as more desirable to selling the property, the Court concluded "[w]e cannot say that the relative values of the alternatives are so disproportionate as to be unequal." *Id.* at 404.

In *Bentley*, the Washington Court of Appeals enforced, as an alternative performance contract, an agreement giving a teacher the right to terminate a post-sabbatical teaching commitment in exchange for a lump-sum repayment of sabbatical benefits. "Either performance, at the teacher's election, satisfies the contract." 38 Wn. App. at 154-56. The court held that a reasonable relationship existed between the alternatives. "At the time of contracting," the performance options "[gave] the teacher flexibility in making plans and choices." *Id.* at 156. Once the teacher chose the option of ***not*** fulfilling her two-year teaching commitment, the district could not "compel performance" of the teaching option—because the repayment amounted to an alternative performance. *Id.*

The ETF here, as the district court concluded, has the earmarks of a proper alternative performance provision, satisfying both the "real option" and "reasonable relationship" aspects of a proper alternative contract under Washington law. *See* Cert. Order at 4190-91.

First, plaintiffs "had a 'real option' between remaining subscribed for the full term or paying the ETF," Cert. Order at 4190-91, because their Clearwire agreements gave them the "flexibility to choose their method of performance." *Minnick*, 683 F. Supp. 2d at 1184. Some plaintiffs signed term contracts that required monthly payments of $29.99 for two years, totaling $719.76, while others entered contracts requiring monthly payments of $36.99 for two years, totaling $887.76. SER 120. But in either instance plaintiffs could choose to terminate their obligation to make monthly payments by paying an ETF—without breaching their contracts. As the district court concluded, either choice could be rational depending on the plaintiff's circumstances—***the*** defining characteristic of an alternative performance contract—and neither choice would give rise to an action for breach. *Minnick*, 683 F. Supp. 2d at 1184-85.

"This freedom of choice is borne out in Plaintiffs' own allegations." *Id.* at 1185. Some plaintiffs ***chose*** to fulfill their commitments to make monthly payments for their full agreed term because that was cheaper than paying the ETF. *Id.*; ER 36-37, 41, 43-44 ¶¶ 5.40, 5.48, 5.69, 5.80, 5.87. Others ***chose*** to terminate and incur the ETF because that was cheaper than making their remaining monthly payments. *Minnick*, 683 F. Supp. 2d at 1185; ER 35, 38-40, 42, 45-46 ¶¶ 5.35, 5.53, 5.57, 5.58, 5.62, 5.74, 5.91, 5.96.

Although the Ninth Circuit in its Certified Question Order observed that Clearwire customers might not have the bargaining power the parties in *Chandler* and *Bentley* apparently enjoyed, Cert. Order at 4191, plaintiffs still had the power to choose between meaningful contract options. Under their Service Agreements, plaintiffs had the freedom to decide "whether it would be to [their] best interests," *Chandler*, 44 Wn.2d at 403, (1) to pay monthly charges for the full contract term as promised, or (2) to avoid that promise by paying the ETF instead. Indeed, they had the choice to avoid both the ETF ***and*** the term commitment simply by choosing the month-to-month option "with no obligations beyond payment of a monthly subscription charge." Cert. Order at 4188. But with a month-to-month contract, subscribers lose the benefit of locking in a monthly rate for a defined term, leaving themselves vulnerable to future price increases that term subscribers need not worry about.

Second, a reasonable relationship exists between plaintiffs' two choices of either (1) paying monthly recurring charges for the full two-year term to which they each agreed or (2) paying an ETF to end their monthly payment obligation early. As the Ninth Circuit observed in its Certified Question Order: "From the point of view of a subscriber who wishes to cancel, the relative value between the two options depends on how much time is left on the contract." Cert. Order at 4191. When they signed up for Clearwire service, each plaintiff promised to make monthly payments for two years, totaling $719.76 or $887.76. SER 120. For all but the last few months of the two-year term, the $220 declining and $180 fixed ETF provided a less costly option than performing their promise to pay monthly recurring charges for the full term.[4] *See* Appx. A. Indeed,

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[4] Clearwire now structures its ETF so that it ***always*** presents a less costly option than a customer's remaining monthly payments. *See* http://www.clear.com/legal/etf.

for customers subject to the $120 ETF declining by $4 per month, the ETF ***always*** presented the cheaper option. *Id.*

Washington courts instruct that courts must judge the relative value of performance alternatives at the time of contracting, not at the time the customer elects to cancel. *Bentley*, 38 Wn. App. at 156. At the time of contracting, plaintiffs could easily calculate the total amount of their monthly fee obligation over the two-year term and see that the ETF would always be the cheaper option (for those subject to the $120 ETF declining by $4 per month) or would be the cheaper option for all but the last few months of the contract term (for those subject to the fixed $180 or $220 declining ETFs). As the Ninth Circuit aptly observed, at the time of contracting customers may not be certain whether they will remain subscribed for the full term. Cert. Order at 4192. In the face of an otherwise ironclad obligation to pay a monthly recurring charge for two years (*see* Section IV.A.1 above), the ETF provides an option for an early, ***less costly*** exit from plaintiffs' monthly payment obligation. Thus, the Court cannot conclude that the "relative values of the alternatives are so disproportionate as to be unequal." *Chandler*, 44 Wn.2d at 404.

Many courts have upheld similar fees as alternative performance provisions. In *Hutchison v. AT&T Internet Services*, 2009 WL 1726344, at *1 (C.D. Cal. May 5, 2009), *aff'd sub nom. Hutchison v. Yahoo! Inc.*, 396 Fed. Appx. 331 (9th Cir. 2010), for example, a court held that an "ETF's true function is not as a penalty, but ... an alternative performance provision" under California law. *Minnick*, 683 F. Supp. 2d at 1184 (quoting *Hutchison*, 2009 WL 1726344, at *5). In *Hutchison*, consumers had an option of paying a $40 monthly fee for a year of service (i.e., $480 in total payments) or a $200 ETF. *Id.* The *Hutchison* court observed that, at the time the parties entered the contract, plaintiffs could end up preferring either option:

> Neither the Plaintiffs, nor the Defendants, at the time the Agreement was entered into, knew if or when Plaintiffs would cancel their term of service. ***As a result, Plaintiffs could foresee, at the time of the contract, rationally choosing either performance option depending on the particular circumstances before [them]****....* If Plaintiffs desired to end their service early in the year, after only three months for example, they could choose to do so and pay the ETF, resulting in an approximately $160 reduction in their obligation.

Hutchison, 2009 WL 1726344, at *5 (emphasis added).[5]

Likewise, in *Schneider v. Verizon Internet Services, Inc.*, No. CV 08-07856 R CWx, at 1 (C.D. Cal. Mar. 18, 2009), *aff'd* 400 Fed. Appx. 136 (9th Cir. 2010), the court held the ETF in an Internet services contract to be a "valid alternative means of performance and not an unlawful liquidated damages provision" under California law:

[5] Although *Hutchison* was dismissed on summary judgment, the court observed "[w]ith greater perspective, the Court would have granted the Motion to Dismiss," 2009 WL 1726344, at *1 n.1, just as the district court did here.

> The ETF is a true option or alternative means of performance because subscribers have the option of either continuing to take service for the duration of the term and paying the monthly service charges, or terminating early for an agreed-upon fee.

Id. at *1.

Implicitly acknowledging *Hutchison* and *Schneider* would, if followed, bar their claims, Plaintiffs speculate those courts would have decided differently today, in light of *In re Cellphone Fee Termination Cases*, 193 Cal. App. 4th 298, 122 Cal. Rptr. 3d 726 (2011). *See* Br. 9. But *Cellphone Fee Termination Cases* distinguished *Hutchison*—and *Cellphone* differs from this case in material ways.

In *Cellphone Fee Termination Cases*, a jury found a certified class of customers breached their term contracts by terminating early and that Sprint imposed an ETF ***for breach***—circumstances no plaintiff alleges here. 122 Cal. Rptr. 3d at 752. The court invalidated the ETF when imposed for breach because Sprint failed to show the ETF reasonably estimated its damages for breach. *Id.* at 751-52. But the jury found that Sprint's damages from plaintiffs' failure to pay monthly charges for the full agreed term exceeded the ETFs; the resulting setoff thereby negated the entire recovery to the class. *Id.* at 731.[6] The California Court of

[6] The trial court, reasoning that the jury failed to follow its instructions on Sprint's damages, granted plaintiffs' motion for partial new trial on that issue. *In re Cellphone Fee Termination Cases*, 122 Cal. Rptr. 3d at 731.

Appeal affirmed in all respects—including the finding that customers breached their term agreements by not paying the monthly charges for the full term and the conclusion that Sprint had the right to set off its damages against plaintiffs' damages. *Id.* at 731, 753. The appellate court remanded for a new trial on the extent of Sprint's damages from the class's breach.

In affirming the jury's verdict that Sprint's ETF functioned as a liquidated damages clause, the court observed that Sprint itself referred to the ETF as "liquidated damages" in several versions of its subscriber agreements, and that the trial court had found that "[o]f those customers who were charged an ETF, 80% were terminated by Sprint and experienced the ETF as the imposition of liquidated damages." *Id.* at 752. The California Court of Appeal acknowledged that the Ninth Circuit in *Hutchison* concluded the ETF in that case functioned as a proper alternative performance contract. But the court distinguished *Hutchison* because "[t]he [*Hutchison*] court found that the fee there provided a realistic and rational choice of alternative performance to the subscriber," while "it is self-evident that in contrast we deal here [in *Cellphone Fee Termination Cases*] with contrary factual findings made after trial on a full evidentiary record." *Id.*

The *Cellphone Fee Termination Cases*, where Sprint imposed the ETF for breach 80% of the time and styled it as a "liquidated damages" clause in its agreements, shed no light on the claims of these plaintiffs—who ***chose*** whether to incur an ETF and do not allege that Clearwire ever imposed the ETF ***on them*** for breach. *See* Section IV.A.4.b below. Indeed, the court in *Cellphone Fee Termination Cases* even acknowledged that "[i]f this case concerned a Sprint clause that stated customers could terminate term contracts early by paying a fee, then that fee might well be an alternative means of performance." *Id. See also Gould v. Corinthian Colleges, Inc.*, 192 Cal. App. 4th 1176, 120 Cal. Rptr. 3d 943, 947 (2011) ("early termination payments" under lease were not an "obligation" but rather "payments for the exercise of a right or privilege"; court properly found tenant exercised early termination provision and did not owe remaining obligations under the lease).

Plaintiffs misplace their reliance on *Mau v. L.A. Fitness Int'l, LLC*, 749 F. Supp. 2d 845 (N.D. Ill. 2010), which did not apply Washington's alternative performance test. In *Mau*, the plaintiff entered into a health club membership agreement obligating him to make monthly payments for one year. The contract provided he could terminate the agreement by paying 50% of his remaining monthly payments. Mau alleged the health club breached the agreement by repeatedly failing to provide trainers as promised. *Id.* at 847. He terminated the agreement and sued to invalidate the ETF, which the club had billed to him. In determining whether the

ETF was an alternative performance provision or an unlawful penalty, the court focused solely on whether the ETF was a disguised "penalty." *Id.* at 848. It did not, as *Bentley* requires, consider whether the ETF gave "the promisor ... free choice between two performances," as measured at the time of contracting. *Bentley*, 38 Wn. App. at 155 (quoting 5 CORBIN, *supra* § 1213).

Instead, the court's analysis was plainly driven by its assumption that the fitness club had breached its obligations to plaintiff and, therefore, should not be allowed to enforce the ETF: "Surely the situation can more fairly be classified as nonperformance (indeed, nonperformance by Fitness rather than by Mau, when his version is credited as it must be on the current motion), rather than alternative performance." *Mau*, 749 F. Supp. 2d at 849; *see also id.* at 850 (rejecting club's argument regarding ETF's enforceability because "it ignores the Termination Clause's invariability in terms of the level of Fitness' own performance—or in this case, nonperformance"). As explained in Section IV.A.5 below, basic contract principles meet the *Mau* court's concern about holding plaintiff to the ETF in the face of defendant's breach: a party in breach of its own contractual obligations cannot insist on performance of the reciprocal obligations, including (in *Mau*) the ETF.

Indeed, the same court that decided *Mau* ***subsequently upheld an ETF*** that, like Clearwire's, terminated the contractual relationship. In *Maddox v. ADT Security Services, Inc.*, 2011 U.S. Dist. LEXIS 1069 (N.D. Ill. Jan. 6, 2011), the plaintiff entered a three-year contract for security services under which she could terminate early if she paid an ETF "equal to 75%" of her remaining charges (an even larger ETF than in *Mau*). *Id.* Less than two years into her contract, plaintiff "started having problems with the system that ADT was unable or unwilling to correct," so she canceled, and ADT billed her the ETF. *Id.* The court dismissed plaintiff's complaint, concluding the ETF was not an unlawful penalty because it did not exceed "a reasonable estimate of the loss from breach." *Id.* at *8. In particular, the court found that the 75% ETF was "25% less than the amount [plaintiff] agreed to pay when she signed and 25% less than the loss ADT sustained, and could recover in a breach of contract suit, as a result of the early termination." *Id.* at *9. Although not analyzing the issue under the "alternative performance" rubric, the court's decision in *Maddox* recognizes that ETFs give customers an economically rational, cheaper alternative to their enforceable promise to pay monthly charges for an agreed term.

3. Giving Customers the Option of Canceling Their Term Contracts Early by Paying an ETF Rather than Making Monthly Payments for the Full Term Cannot Be Unconscionable.

If the ETF is an unenforceable "penalty," as plaintiffs urge this Court to hold, then plaintiffs have only one option: pay the remaining monthly payments on their contracts for the full two-year term. But this would mean that plaintiffs who fail to fulfill their term commitments would owe ***more*** in unpaid monthly fees than they would owe by electing the ETF option—as recognized in the cases plaintiffs cite.

For instance, in *Cellphone Fee Termination Cases*, the court invalidated Sprint's ETF when imposed for breach, but the jury found that Sprint's damages from plaintiffs' failure to fulfill their term obligations exceeded the collected ETFs. 122 Cal. Rtpr. 3d at 731, 751-52. Sprint's setoff thus would have negated any recovery to the class. *Id.* at 731. The California Court of Appeal affirmed the finding that customers breached their term agreements by not paying the monthly charges for the full term, and the conclusion that Sprint was entitled to setoff its damages. *Id.* at 731, 753. And even though the court remanded for another computation of Sprint's damages, the proper measure of Sprint's damages would be the sum of the class's unpaid monthly charges under the term contracts less Sprint's avoided costs. *Id.* at 735-36, 748, 751-53.

Similarly, in *Spirit Locker, Inc. v. EVO Direct, LLC*, 696 F. Supp. 2d 296 (E.D.N.Y. 2010) (*cited at* Br. 21), the court explained that "[e]ven if the ETF is an unlawful penalty, EVO might have a claim for breach of contract against Spirit Locker for terminating the agreement early, in which case Spirit Locker would be obligated to pay for EVO's actual damages." *Id.* at 308 (citing *JMD Holding Corp. v. Congress Fin. Corp.*, 795 N.Y.S.2d 502 (2005) ("where a purported liquidated damages clause is an unenforceable penalty, 'the rest of the agreement stands, and the injured party is remitted to the conventional damage remedy for the breach of that agreement'")).

Other courts have also noted that without the ETF and early termination option, the customer's early termination would constitute breach, rendering the customer liable for actual damage measured by the sum of the remaining payments for the agreed term. *See Maddox*, 2011 U.S. Dist. LEXIS 1069, at *8-9 (ETF equal to 75% of amount remaining under three-year contract was less than what ADT "could recover in a breach of contract suit, as a result of the early termination"); *Gould*, 120 Cal. Rtpr. 3d at 947 ("Had Corinthian made no such [early termination] payments, it would not have been in breach of the lease. The lease would simply have continued."); RESTATEMENT (SECOND) OF CONTRACTS § 356, cmt. a (if liquidated damages provision is unenforceable, "[t]he rest of the agreement remains enforceable," and the non-breaching party has resort to general contract remedies). These cases comport with Washington law, which likewise holds the breaching party liable for expectation damages—that is, the amount that would put the injured party "into as good a pecuniary position as [it] would have [been in] if the contract had been performed." *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 39, 686 P.2d 465 (1984).

These cases illustrate the futility of plaintiffs' claims. As the district court pointed out in its dismissal order: "Plaintiffs have not pled the unenforceability of the severability provision of the contract. Thus, even if the ETF is deemed unlawful and that provision of the contract is unenforceable, Plaintiffs would still have their payment obligations under the monthly fee provisions." *Minnick*, 683 F. Supp. 2d at 1187. *See also Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 320, 103 P.3d 753 (2004) ("[W]hen parties have agreed to a severability clause..., courts often strike the offending unconscionable provisions to preserve the contract's essential term....").

Plaintiffs have not challenged the district court's ruling in this regard. Indeed, they make substantially the same point by arguing that their ***only*** contractual performance obligation is to pay monthly charges for the agreed term. Br. 33. But that would mean seven plaintiffs

(Minnick, Schultz, Jelinski, Bartley, Grefsrud, Reynolds, and Girod) owe Clearwire money, i.e., the difference between (a) the sum of their unpaid monthly payments and (b) the ETF each incurred. ER 35, 38-40, 42, 45-46 (¶¶ 5.35, 5.53, 5.58, 5.62, 5.74, 5.91, 5.96). Nothing in Washington law forbids Clearwire and plaintiffs from making an agreement that allows plaintiffs ***a less expensive option***, as the district court understood. *See, e.g., Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 519, 210 P.3d 318 (2009) (court will not invalidate terms as substantively unconscionable unless they are "shocking to the conscience," "monstrously harsh," or "exceedingly calloused"; "[i]t is black letter law of contracts that the parties to a contract shall be bound by its terms").[7]

4. Plaintiffs' Efforts to Show the ETF Is Not an Alternative Performance Provision Fail.

a. An Alternative Performance Provision Need Not Require Clearwire to Provide Two Years of Service in Exchange for Plaintiffs' Early Termination and ETF.

Plaintiffs argue the ETF does not meet the definition of an alternative contract because they cannot obtain two years of Clearwire

[7] Washington law also recognizes procedural unconscionability, which asks whether a party had a reasonable opportunity to understand the terms. *Torgerson*, 166 Wn.2d at 518-19. Plaintiffs had a reasonable opportunity to understand the ETF terms. They agree their agreements described the ETF in "several places." Br. 13. The introduction to their subscription agreements emphasized in bold, capitalized letters that they were subject to an ETF, which was set forth in a separately titled section of the agreement. *See* Section III.A.2 above.

service by canceling their term agreement and paying the ETF. Br. 31-34. Plaintiffs peg this illogical argument on language lifted from Corbin (quoted in *Chandler* and *Bentley*) and Williston, which define alternative contracts as involving a party promising to perform one of two alternative performances in exchange for "the" return performance by the other party. Br. 32 (quoting *Chandler*, 44 Wn.2d at 401 (quoting 5 CORBIN ON CONTRACTS § 1079, at 379); *Bentley*, 38 Wn. App. at 155 (quoting 5 CORBIN ON CONTRACTS § 1082); and 24 WILLISTON ON CONTRACTS § 65:7). In fact, the very authorities on which plaintiffs rely refute their argument that a true alternative performance provision (a) must offer the same performance in exchange for either of the promisor's alternative performance options, and (b) cannot result (as here) in termination of the parties' relationship, relieving both of further obligations to each other.

This Court long ago recognized that an alternative performance provision may contemplate termination. As *Chandler* explained:

> If ... the contract provides that the promisor shall have a choice or option between performances, or that on payment of a named sum his ***contract shall be null and void***, or that for a specified payment he may regain ***the legal privilege of not rendering the promised performance***, the contract may well be regarded as an alternative contract.

Chandler, 44 Wn.2d at 402 (quoting 5 CORBIN ON CONTRACTS § 1213, at 883, 884) (emphasis added). The decision in *Bentley* illustrates the principle. There, a teacher had the option of continuing her relationship with a school district by teaching for two years post-sabbatical, or ***terminating*** the relationship before the end of the agreed term and repaying sabbatical benefits. *Bentley*, 38 Wn. App. at 154. Applying *Chandler*, the court of appeals held the teacher's right to terminate the contract early in exchange for a lump-sum payment constituted an alternative performance option—even though it resulted in termination of the relationship, relieving both parties of any obligation to perform further. *Bentley*, 38 Wn. App. at 155-56 (quoting *Chandler*, 44 Wn.2d at 402).

Thus, as *Chandler* and *Bentley* show, an alternative contract may contemplate terminating the agreement. By contrast, if plaintiffs were correct, the teacher's option to terminate her teaching obligation in *Bentley* by repaying sabbatical benefits could ***not*** be an alternative contract unless the district remained obligated to pay salary and benefits ***after*** she quit.

Plaintiffs cite no cases adopting their absurd reading, which Corbin likewise rejects. Indeed, Corbin makes clear that "[a] contract in which the promisor is given ***a power (option) of termination*** by notice is an 'alternative contract.'" 5 CORBIN ON CONTRACTS § 1079, at 455 n.46 (emphasis added). And plaintiffs themselves admit an alternative contract may exist "even though one of the alternative performances is the payment of a fixed sum of money; that fact alone does not make the contract one for single performance with a liquidated damage provision for breach." Br. 24 (quoting 24 WILLISTON ON CONTRACTS § 65: 7, at 263).

Courts in other states likewise hold, in a variety of contexts, that the right to terminate a contract early in exchange for a lump-sum payment constitutes an alternative performance option—even though it results in termination of the relationship and frees both parties of the obligation to perform. "Where a contract for a specified period of time permits a party to terminate the agreement before its expiration in exchange for a lump-sum monetary payment, the payment is merely considered an alternative to performance, and not a penalty." *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1314-15, 27 Cal. Rptr. 3d 797 (2005) ($150 ETF in merchant credit card agreement constituted alternative performance provision). In *Kuhlemeier v. Lack*, 50 Cal. App. 2d 802, 808, 123 P.2d 918 (1942), for example, a lessee had the right to terminate a lease early, provided the lessee forfeited his rental deposit upon termination. This clause provided an alternative performance option, not liquidated damages, because the "so-called forfeiture provision came into operation solely as a result of the lessee's ***voluntary action in exercising the option to terminate the lease***. Since the option was exercised in accordance with the terms of the contract, it cannot be considered as a breach of the contract." *Id.* at 807 (emphasis added). *See also In re Cmty. Med. Ctr.*, 623 F.2d 864, 867 (3d Cir. 1980) ("In an alternative contract ... [i]f either alternative operates as a ***complete discharge*** of the promisor's duty ***and prevents any further remedy against him***, the agreement may be viewed as an alternative contract."); *W. Camps, Inc. v. Riverway Ranch Enters.*, 70 Cal. App. 3d 714, 727, 138 Cal. Rptr. 918 (1977) ("the right to terminate" lease upon paying $60,000 was "alternative performance" option, "not a provision for liquidated damages, upon its breach of the lease agreement"); *Blank v. Borden*, 11 Cal. 3d 963, 971, 115 Cal. Rptr. 31 (1974) (ETF in listing contract upheld as alternative performance provision); *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co.*, 589 N.W.2d 499, 502 (Minn. Ct. App. 1999) (ETF in advertising service agreement not liquidated damages because "parties to a contract may legitimately agree to pay a preset amount in the event of voluntary termination").

At bottom, plaintiffs contradict settled law when they argue that Clearwire cannot offer the ETF as an alternative means of performance unless it remains obligated to provide two years of service. Under an alternative contract, a party may "for a specified payment ... regain the legal privilege of not rendering the promised performance," *Chandler*, 44 Wn.2d at 402, just as plaintiffs who paid the ETF here regained the privilege to stop paying their monthly recurring charge. *See, e.g.*, *TMT Bear Creek*, 140 Wn. App. at 195-96 (enforcing early termination agreement under which tenant paid fees and landlord agreed to release tenant from lease term); *Gould*, 120 Cal. Rptr. 3d at 947 ("early termination payments [under lease] ...were not an 'obligation' under the lease" but rather "payments for the exercise of a right or privilege" to be released from lease); 11 CORBIN ON CONTRACTS § 58.18, at 504 (2005) ("If a builder promises to build two houses by a specified day or pay the promisee $4,000," one possible interpretation is the parties "meant that the builder was to have the privilege of not building; the price of this privilege was fixed at $4,000. Thus interpreted, the agreement would be an option contract, with a price fixed for the exercise of an option to terminate.").

b. The Hypothetical that Clearwire *Might* Assess an ETF for a Customer's Breach Has No Bearing on Whether "the ETF at Issue *in This Case*" Operates as an Alternative Performance Provision.

These plaintiffs do ***not*** allege that Clearwire charged any of them an ETF for breaching the Service Agreement. Instead, plaintiffs allege they ***chose*** either to cancel early and pay the ETF, ER 38 ¶ 5.53 (Schultz), ER 40 ¶ 5.62 (Bartley), ER 42 ¶ 5.74 (Grefsrud), ER 45 ¶ 5.91 (Reynolds), ER 46 ¶ 5.96 (Girod), or ***not*** to cancel and continue making monthly payments ***because that was less costly***. ER 35-36 ¶¶ 5.39-5.40 (Stephenson), ER 37 ¶¶ 5.46-5.48 (Reimers), ER 41 ¶ 5.69 (Cuhel), ER 43 ¶ 5.77-5.80 (McVicker), ER 44 ¶ 5.87 (Keller). (The other plaintiffs, Minnick and Jelinski, chose to terminate early but refused to pay an ETF or their remaining monthly payments. ER 35 ¶ 5.35; ER 39 ¶ 5.58.)

Nevertheless, plaintiffs focus on the hypothetical possibility that Clearwire ***might*** impose the ETF on ***other*** customers for breach and argue that ***if*** Clearwire imposed an ETF for "nonperformance," that would result in "terminat[ion of] the contractual relationship," which supposedly requires analysis under the liquidated damages standard. Br. 24-29 (quoting 24 WILLISTON ON CONTRACTS § 65:7 (4th ed. 2002)). As a matter of law, however, the theoretical possibility that Clearwire might have assessed an ETF on some other customer under unspecified circumstances makes no difference. Even "in class actions, the named representatives must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Pence v. Andrus*, 586 F.2d 733, 736-37 (9th Cir. 1978) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494-98 (1974) (plaintiffs lacked standing where they made only general allegations of unconstitutional conduct and failed to allege they themselves suffered injury)). *See also Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23 (9th Cir. 2003) (plaintiff without standing cannot sue for those who might have claim).

Thus, under settled law, plaintiffs' hypothetical argument is not part of "this case," and it has no bearing on the Certified Question. *See Carlsen v. Global Client Solutions, LLC*, __ Wn.2d __, 2011 WL 1796409, at *2 (May 12, 2011) (this Court "consider[s] the legal issues not in the abstract but based on the certified record provided by the federal court"); *see also* RCW 2.60.030(2) ("Certificate procedure shall include and be based upon the record"). This Court should decline plaintiffs' invitation to give an advisory opinion based on the application of the ETF in hypothetical circumstances not in the record. "[T]his court will not render judgment on a hypothetical or speculative controversy." *Walker v. Munro*, 124 Wn.2d 402, 415, 879 P.2d 920 (1994) ("Although courts in some states do render advisory opinions, we do not do so in this jurisdiction.").[8]

With respect to these named plaintiffs, then, the ETF claims rest purely on the premise that Clearwire did something wrong by providing plaintiffs an option (which some exercised) for an early exit from their monthly obligation, rather than drafting its two-year contracts so that plaintiffs faced an ironclad obligation to pay the monthly recurring charge.

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[8] Unlike this record, which involves twelve individual plaintiffs' claims that no court has certified for class treatment, the *Cellphone Fee Termination Cases* involved a trial conducted after the court granted class certification. Unlike this case, the certified class's claims were before the trial court, ***and*** the court found that Sprint overwhelmingly imposed its ETF after (and because of) customers' breach. 122 Cal. Rptr. 3d at 731, 752.

But "[n]o legal principle ... makes void a provision ... granting to the [party] the right to terminate a [contract] for a term of years" if the party "agrees to pay a stipulated sum in the event that he elects to exercise the option to terminate." *Kuhlemeier*, 50 Cal. App. 2d at 808.

c. The Hypothetical that Clearwire *Might* Assess an ETF in an Amount Exceeding the Remaining Monthly Payments Has No Bearing on Whether "the ETF at Issue *in This Case*" Operates as an Alternative Performance Provision.

The Complaint does not allege that Clearwire imposed an ETF on ***any*** plaintiff who failed to make an election in an amount exceeding the sum of the remaining monthly payments. Instead, the Complaint alleges that plaintiffs ***elected*** to terminate and incur the ETF when doing so presented the less expensive option. ER 15-58. The theoretical possibility that Clearwire might have assessed an ETF on some other customer in an amount exceeding the remaining monthly payments therefore has no bearing on the Certified Question regarding "the ETF at issue ***in this case***," i.e., as allegedly applied against any of these plaintiffs. Cert. Order at 4192. *See Carlsen*, 2011 WL 1796409, at *2; RCW 2.60.030; *Walker*, 124 Wn.2d at 415.

Nevertheless, plaintiffs cite the original Restatement of Contracts, Br. 34-35, and cases relying on it for the proposition that a promisor (here, the customer) who breaches an alternative performance contract without electing one alternative should face liability only "in accordance with the alternative that will result in the smallest recovery." RESTATEMENT (FIRST) CONTRACTS § 344 (1932). Even if plaintiffs ***had*** alleged facts implicating the first Restatement's rule, however, the ALI ***omitted*** the "cheaper election" rule from the Restatement (Second) of Contracts—and courts naturally have attributed legal significance to the omission. *See Schwan-Stabilo Cosmetics GMBH & Co. v. PacificLink Int'l Corp.*, 401 F.3d 28, 34 (2d Cir. 2005) (noting omission and declining to invoke rule to permit breaching party to benefit from a favorable option party did not elect) (quoting 25 WILLISTON, *supra*, § 66:106); *Gronemeyer v. Hunter Mfg. Corp.*, 106 A.2d 519, 523-24 (Del. Ch. 1954) (defendant liable for alternative elected even though that alternative may have been more onerous than unchosen option; comparing Williston with first Restatement). Further, Williston (on whom plaintiffs rely heavily) notes that courts have rejected the rule plaintiffs advocate: "[W]here an alternative contract provides as one alternative the payment of a sum of money, the damage for breach of the obligation has been regarded as the sum of money promised, although that conceivably may be the alternative more onerous to the defendant." 25 WILLISTON ON CONTRACTS § 66:106.

5. If Clearwire Breached Its Service Commitment, the Law Provides Plaintiffs with a Remedy without Invalidating the ETF.

Plaintiffs devote much of their brief to complaints about service quality, apparently hoping that this Court—like the district court in *Mau*—will make the same analytical misstep: believing (falsely) that it must invalidate the ETF to avoid the inequity of imposing an ETF on customers who want to escape their contract because they did not receive what they agreed to. In fact, black-letter contract law gives plaintiffs a remedy that has nothing to do with invalidating the ETF.

When a contract requires "performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance." *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Thus, assuming the truth of plaintiffs' allegations that Clearwire failed to provide service consistent with its contractual obligation, settled Washington law relieves them of their obligation to pay an ETF or their monthly recurring charges—provided they satisfy their own contractual obligations for resolving service-related concerns. The validity of the ETF as an alternative performance contract thus has nothing to do with service quality issues or breach of contract remedies.

B. The ETF Does Not Function as a Liquidated Damages Clause.

Plaintiffs urge that the ETF functions not as an alternative performance provision but as a liquidated damages clause. In fact, the ETF does not fit the liquidated damages rubric.

The law defines a liquidated damages provision as an advance agreement by the parties on a "remedy for breach." 24 WILLISTON ON CONTRACTS § 65:7, at 263 (4th ed. 2002) (*cited in* Br. 24-25). Thus, "invoking a stipulated damages provision ***requires*** establishing that the contract in question was breached." *Id.* (emphasis added). *See also Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 894, 881 P.2d 1010 (1994) (valid liquidated damages "is a reasonable forecast of the compensation necessary to make the seller whole should the buyer breach"); *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 559, 730 P.2d 1340 (1987) (same); *Watson v. Ingram*, 70 Wn. App. 45, 53, 851 P.2d 761 (1993), *aff'd* 124 Wn.2d 845, 881 P.2d 247 (1994) (liquidated damages evaluated "by reference to the prospective difficulty of estimating possible damages that would flow from a breach"); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) ("Damages for breach by either party may be liquidated in the agreement....") (*cited at* Br. 19).

The hallmark of a liquidated damages clause is that it is triggered ***only*** upon breach. Plaintiffs agree, arguing that "if a non-breaching party has the right, under the terms of the contract, to impose a stipulated sum of money on a ***breaching*** party, then this indicates that the stipulated sum is liquidated damages." Br. 23 (emphasis added). They do not cite a single Washington case applying a liquidated damages analysis, let alone enforcing a liquidated damages clause, in the ***absence*** of breach; instead, they rely entirely on cases that impose liquidated damages only after a breach. *See id.* at 20 (citing *S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 312 P.2d 912 (1975) (liquidated damages provision invoked on contractor's breach of construction agreement held unenforceable penalty) (citing *Brower Co. v. Garrison*, 2 Wn. App. 424, 425, 434-36, 468 P.2d 469 (1970) (reversing and remanding where court improperly failed to enforce reasonable liquidated damages provision on breach by delayed performance); *Mgmt, Inc. v. Schassberger*, 39 Wn.2d 321, 330-31, 326 P.2d 283 (1951) (liquidated damages provision invoked on breach of non-compete agreement held unenforceable penalty; breaching party still liable for damages flowing from breach)).

Under Washington case law, and plaintiffs' own reasoning, a liquidated damages analysis does not apply here because these twelve plaintiffs do ***not*** allege Clearwire imposed the ETF on any one of them for breach: "Plaintiffs' Complaint is devoid of any allegation Clearwire actually imposed [the ETF] against any named Plaintiff for any breach of a non-ETF term." *Minnick*, 683 F. Supp. 2d at 1185. *See also* ER 34-46 ¶¶ 5.34-5.35, 5.40, 5.48, 5.53, 5.57-5.58, 5.62, 5.69, 5.74, 5.80, 5.87, 5.91, 5.96 (plaintiff-specific allegations). Plaintiffs do not allege Clearwire imposed the ETF on them for breach; instead, ***they chose*** whether to incur the ETF based on what was the less costly option for them. That fact sharply distinguishes this case from the *Cellphone Fee Termination Cases*, on which plaintiffs rely. There, unlike here, the trial court found, after class certification, that Sprint imposed its ETF for breach in 80% of the cases involving the ETF. 122 Cal. Rptr. 3d at 752. The court found "Sprint declared contracts breached, terminated service, and imposed ETFs as liquidated damages resulting from the asserted breaches." *Id.*

Plaintiffs attempt to overcome the absence of breach here by characterizing the ETF in this case as "a contract contemplating but a single, definite performance with an additional charge contingent on the breach of that performance," and arguing it thus operated as a liquidated damages clause. Br. 26. But the authority plaintiffs cite for that proposition, *Garrett v. Coast & Southern Federal Savings & Loan Ass'n*, 9 Cal.3d 731, 108 Cal. Rptr. 845 (1973), involved a vastly different situation. In *Garrett*, the court considered whether late charges under a promissory note were alternative performance provisions or penalties. *Id.* at 847. The court concluded the charges were penalties because borrowers had to pay them ***in addition to*** the "entire unpaid principal balance." *Id.* at 849.

In contrast, plaintiffs here chose to enter term contracts that gave them the option of performing the entire term for monthly charges, or of terminating early and paying an exit fee. By electing to pay the ETF, plaintiffs also elected ***not*** to pay the remaining monthly payments owed under their term contracts. In other words, unlike in *Garrett*, where borrowers owed both their loan payment and a fee, plaintiffs entered either/or contracts, under which they owed the entire unpaid balance ***only*** if they did not elect to terminate early and pay the ETF. Plaintiffs thus had ***two*** definite means of performance, one of which was a lump sum for the right to be released from the term contract, and one of which was a series of payments for the duration of the term contract.

C. The Court Should Decline Plaintiffs' Invitation to Go Beyond the Certified Question to Hold the ETF Is Unenforceable.

The Certified Question asks only whether under Washington law, the ETF as it allegedly operated in the case of these twelve plaintiffs acts as an alternative performance provision or as a liquidated damages clause: "Does Washington law treat the ETF at issue in this case as an alternative performance provision, or as a liquidated damages clause?" Cert. Order at 4192. Plaintiffs invite the Court to go well beyond the Certified Question and rule that the ETF in all circumstances functions as an unenforceable penalty, regardless of the quality of service Clearwire's other customers receive, or whether other customers would prefer to retain the option of avoiding paying monthly charges for the agreed term in exchange for paying a lesser ETF. But as plaintiffs admit, "the enforceability of the ETFs is a fact-intensive question that can ***only*** be fully resolved after discovery and trial." Br. 21-22. And the Court itself has observed the need to confine its ruling to the Certified Question. *See Carlsen*, 2011 WL 1796409, at *2; *Walker*, 124 Wn.2d at 415. *See also* RCW 2.60.030.

In urging the Court to go beyond the Certified Question, plaintiffs rely on *Cellphone Fee Termination Cases*, which held (after trial) that the ETFs in that case functioned as unenforceable liquidated damages. But Washington law on liquidated damages differs significantly from California law. Washington law favors liquidated damages clauses and presumes their enforceability. *See Wallace Real Estate*, 142 Wn.2d at 886-87; Br. 19-22. This Court has explained that "liquidated damages provisions lend certainty to the parties' agreements and permit parties to resolve disputes efficiently in the event of a breach." *Watson*, 124 Wn.2d at 851. By contrast, California law—the law applied in the *Cellphone Fee Termination Cases*—presumes liquidated damages clauses to be ***void***. 122 Cal. Rptr. 3d at 746-47 (citing *Garrett*, 9 Cal. 3d at 738). *See also In re*

DirecTV Early Cancellation Litig., 738 F. Supp. 2d 1062, 1089 (C.D. Cal. 2010) ("Unlike California law, liquidated damages clauses are presumed to be valid in ... Washington."). Thus, even if the Court found the ETFs to be liquidated damages provisions, plaintiffs would need to present evidence to see if they could overcome the presumption of validity.

On this record, plaintiffs' arguments as to invalidity are baseless.

First, plaintiffs' factual allegations flatly contradict their conclusory assertion that the ETF has an "in terrorem effect of inducing performance rather than compensating loss." Br. 20. The Complaint shows that seven plaintiffs ***chose*** to incur the ETF instead of fulfilling monthly term commitments. ER 35, 38-40, 42, 45-46 (¶¶ 5.35, 5.53, 5.58, 5.62, 5.74, 5.91, 5.96). Rather than having an "in terrorem effect," the ETF provided a cheaper (and presumably welcome) alternative. To the extent plaintiffs argue the ETF had an "in terrorem" effect by "forcing" some of them to make the monthly payments they already promised to make, Br. 20, Williston explains the folly of that reasoning:

> [A] subtle distinction, not always observed, exists between clauses that merely induce performance and those that operate coercively; and the failure to observe it, either by judges in reaching and declaring their decisions, or by counsel in reading and analyzing those opinions, will result in the invalidation of clauses that ought, under a proper application of the rule, to be enforced. The distinction is based in the fact that damages for breach of contract, by their nature, induce performance of contractual undertakings; and this is no less true of agreed upon damages than it is of damages recoverable in the absence of a liquidated damages

> clause. In other words, one reason the parties to a contract perform their obligations under it is their potential liability for damages should they fail to do so; in that sense, the possibility of a damage award is by its nature designed to induce performance of a contract. Since this is true, to the extent that a liquidated damages clause does no more than duplicate the in terrorem effect of the damage award that would be available in the absence of the clause, it should be declared valid despite the fact that it induces or secures the performance of the contract.

24 WILLISTON § 65:1, at 231-32 (*cited in* Cert. Order at 4190).

Second, plaintiffs argue the ETF gives Clearwire "incentive to provoke a breach in order to make a profit," Br. 21-22, apparently by forcing customers to pay an ETF when it would exceed the remaining monthly payments. But ***no*** plaintiff alleges he or she breached the Service Agreement, that Clearwire provoked a breach, or that he or she wound up owing an ETF that exceeded the sum of the remaining monthly payments.

Finally, plaintiffs fail to come to grips with the fact that this Court has long recognized that if a liquidated damages clause is unenforceable, the party seeking to enforce the liquidated damages clause is nevertheless entitled to contract damages for the other party's breach. *See Walter*, 107 Wn.2d at 562 (though liquidated damages clause unenforceable, injured party "entitled to a deficiency judgment" "based on actual damages" for breach of lease; remanding to determine damages). *See also Aubrey v. Angel Enters., Inc.*, 43 Wn. App. 429, 435, 717 P.2d 313 (1986) (reversing and remanding with instructions to adjust damages award). If this Court exceeds the Certified Question and holds Clearwire's ETF unenforceable as to all customers, then—as in *Cellphone Fee Termination Cases*, discussed in Section IV.A.3 above—Clearwire will be entitled to seek the amount of unpaid monthly charges that Minnick, Schultz, Jelinski, Bartley, Grefsrud, Reynolds, and Girod owe, which exceeds the amount of their ETFs. Moreover, Clearwire would be entitled to collect contract damages from customers who breached their term commitments, except for perhaps the small handful (if any) who irrationally chose to pay the ETF when it exceeded their remaining monthly payments.

VI. CONCLUSION

This Court should answer the certified question by ruling that Washington law treats the ETF at issue as an alternative performance provision, not as a liquidated damages clause. If the Court concludes that the ETF is a liquidated damages clause, the Court should not go beyond the certified question to opine as to the ETF's enforceability.

RESPECTFULLY SUBMITTED this 13th day of June, 2011.

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By ______________________

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PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record by email and U.S. mail:

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Dated at Seattle, Washington this 13th day of June, 2011.

Denise Ratti

Denise Ratti

APPENDIX A

Comparison of Monthly Payment Obligation to Early Termination Fee over Two-Year Term
(Bolded ETF Where Cheaper Option)

Month	$36.99 Per Month[1]	$29.99 Per Month[2]	$180 Fixed ETF[3]	$220 Less $5 Per Month Declining ETF[4]	$120 Less $4 Per Month Declining ETF[5]
1	$887.76	$719.76	**$180**	**$220**	**$116**
2	$850.77	$689.77	**$180**	**$215**	**$112**
3	$813.78	$659.78	**$180**	**$210**	**$108**
4	$776.79	$629.79	**$180**	**$205**	**$104**
5	$739.80	$599.80	**$180**	**$200**	**$100**
6	$702.81	$569.81	**$180**	**$195**	**$96**
7	$665.82	$539.82	**$180**	**$190**	**$92**
8	$628.83	$509.83	**$180**	**$185**	**$88**
9	$591.84	$479.84	**$180**	**$180**	**$84**
10	$554.85	$449.85	**$180**	**$175**	**$80**
11	$517.86	$419.86	**$180**	**$170**	**$76**
12	$480.87	$389.87	**$180**	**$165**	**$72**
13	$443.88	$359.88	**$180**	**$160**	**$68**
14	$406.89	$329.89	**$180**	**$155**	**$64**
15	$369.90	$299.90	**$180**	**$150**	**$60**
16	$332.91	$269.91	**$180**	**$145**	**$56**
17	$295.92	$239.92	**$180**	**$140**	**$52**
18	$258.93	$209.93	**$180**	**$135**	**$48**
19	$221.94	$179.94	**$180**	**$130**	**$44**
20	$184.95	$149.95	**$180**	**$125**	**$40**
21	$147.96	$119.96	$180	**$120**	**$36**
22	$110.97	$89.97	$180	$115	**$32**
23	$73.98	$59.98	$180	$110	**$28**
24	$36.99	$29.99	$180	$105	**$24**

[1] SER 120 ¶ 14.
[2] *Id.*
[3] ER 30 ¶ 5.18.
[4] *Id.* ¶ 5.19.
[5] *Id.* ¶ 5.20.

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Case Name: *Minnick, et al. v. Clearwire US, LLC*

Good afternoon - Please see attached for filing:

Appellee's Answering Brief

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